Supreme Court, U.S.

(1)

97-458 JUL 11 1997

No. _____

OFFICE OF THE CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1996

Lakeland Lounge of Jackson, Inc.,

Petitioner,

v.

City of Jackson, Mississippi,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Mississippi

---

PETITION FOR WRIT OF CERTIORARI

ROBERT G. GILDER #4832
GILDER LAW FIRM
ATTORNEY FOR PETITIONER
P.O. BOX 193
SOUTHAVEN, MS 38671
(601) 342-1444

57 pp

QUESTIONS PRESENTED

1. Does state regulation of the commercial free speech exposure of female breasts but not male breasts violate the Equal Protection Clause?

2. To withstand Equal Protection Clause scrutiny, must a state's gender-based discriminatory law be shown to be more effective in furthering its legitimate objectives than a gender-neutral law?

3. Does the proper Equal Protection Clause analysis of a gender-based discriminatory law require a showing that the law possess a direct relationship to the legitimate objective sought to be furthered by it?

PARTIES TO THE PROCEEDING

The caption of the case contains the names of all the parties to the proceeding. There is no parent or subsidiary company to be listed pursuant to S. Ct. R. 29.6

TABLE OF CONTENTS

QUESTIONS PRESENTED.....i
PARTIES TO THE PROCEEDING.....ii
TABLE OF CONTENTS.....iii
TABLE OF AUTHORITIES.....iv
OPINIONS BELOW.....1
JURISDICTION.....1
CONSTITUTIONAL PROVISIONS INVOLVED.....2

STATEMENT.....2

REASONS FOR GRANTING THE PETITION.....3

I. Conflict Between State Courts.....4

II. The Question Presented Is Important.....5

III. The Court Below Misapplied The Holding Of *Michael M. v. Sonoma County Superior Court*.....5

IV. This Case Implicates The Continued Validity Of *Mississippi University For Women v. Hogan*.....7

TABLE OF CONTENTS-Continued

Page

V. The Question Is Of First Impression And Needs To Be Addressed By This Court.....8

CONCLUSION.....8

APPENDIX.....App. 1

A. Supreme Court Decision.....App. 1

B. Chancery Court Opinion.....App. 36

C. Order Denying Petition For Rehearing.....App. 42

TABLE OF AUTHORITIES

CASES

Page

Michael M. v. Sonoma County Superior Court, 450 U.S. 464 (1981).....5, 6

Mississippi University For Women v. Hogan, 458 U.S. 718 (1982).....7, 8

People of New York v. David, 585 N.Y.S.2d 149 (1991).....4, 6

Constitutional Provisions

The Fourteenth Amendment to the Constitution of the United States.....2

The First Amendment to the Constitution of the United States.....4

PETITION FOR A WRIT OF CERTIORARI

Lakeland Lounge, Inc., respectfully petitions for a writ of certiorari to review the judgment of the Supreme Court of Mississippi in this case.

OPINIONS BELOW

The opinion of the Supreme Court of Mississippi is reported at 688 So.2d 744. The opinion of the Hinds Chancery Court was rendered on July 9, 1993, and is unreported.

JURISDICTION

The Supreme Court of Mississippi entered its judgment on December 12, 1996 (App., infra, 1), and denied a rehearing on February 13, 1997 (App., infra, 42). The Honorable Justice Scalia granted Petitioner's Application no. A-770 for an extension of time, permitting this Petition to be timely filed on or before July 11, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

The Fourteenth Amendment to the Constitution of the United States reads, *inter alia*, "No state shall ...deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT

After two businesses offering topless dancing adult entertainment opened in Jackson, Mississippi, the city council enacted legislation regulating it. About the time this legislation went into effect, Petitioner also opened for business in Jackson and offered topless dancing.

Essentially, the Respondent's regulation of commercial free speech in the form of topless dancing prohibits Petitioner from offering topless dancing by females, but not males, at its current location. In other words, if Petitioner offered male topless dancing, the Respondent could not complain.

But Petitioner does not offer male topless dancing. It offers female topless dancing, and on July 9, 1993, Chancellor Dillard of the Hinds Chancery Court, Hinds

County, Mississippi, held this discriminatory regulation of commercial free speech to violate the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States. Respondent appealed, and the Supreme Court of Mississippi reversed Chancellor Dillard, stating that precedent has established the constitutionality of this type of sex-based discrimination because of the physical differences between males and females and the important public interests at stake.

What the matter boils down to, however, is this: Respondent says sex-based discrimination in the regulation of commercial free speech is constitutional, and thus, its regulations are permissible. Petitioner contends that sex-based discrimination is no more constitutional in this setting than it would be in any other, hence, Respondent's discriminatory regulations violate the Fourteenth Amendment.

REASONS FOR GRANTING THIS PETITION

The decision below directly conflicts with those of other states on an important question common to all states concerning the validity under equal protection clause

scrutiny of gender-based restrictions on First Amendment commercial free speech rights. Second, it represents a misapplication of a prior decision of this Court, which is consequently now ripe for reconsideration, regarding the standard of review under the equal protection clause in gender-based challenges to legislative discriminatory regulation of commercial free speech. Finally, it implicates an important constitutional questions of first impression in this Court on which the lower courts need uniform guidance.

I. Conflict Between State Courts.

Insofar as the decision below holds that state discrimination in regard to the exposure of human breasts is legal, it is in direct conflict with the decision of the State of New York in People of New York v. David, 585 N.Y.S.2d 149 (1991) (holding that a local ordinance prohibiting females from exposing their breasts on public beaches violated the Equal Protection Clause by not serving a legitimate government interest rather than a content-neutral law because male and female breasts are physiologically similar except for lactation capability). App. 32.

II. The Question Presented Is Important.

Because the question concerns a State's restriction of commercial free speech solely on the basis of gender, it is of paramount importance that such encroachments be scrutinized by this Court, free from social or political pressure, which, unfortunately, sometimes comes to bear on even the fairest and most impartial State Courts of Last Resort when, as in this case, the controversial business is located in the same city where the court sits.

III. The Court Below Misapplied The Holding Of *Michael M. v. Sonoma County Superior Court*.

The court below relied heavily on the decision of this Court in *Michael M. v. Sonoma County Superior Court*, 450 U.S. 464 (1981), to conclude that Respondent's differential treatment of the sexes is nothing more than a legitimate recognition that males and females are not similarly situated for the purposes of commercial free speech regulation. This misapplied *Michael M.* by extending it beyond its intended reach.

In *Michael M.*, this Court upheld, by a badly splintered decision, a gender-based discriminatory statutory rape law on the ground that, where sexual intercourse is concerned, women and men are not similarly situated. The distinction was

the substantial difference in risk suffered by women of unwanted pregnancy. Since males do not suffer that risk, they are not in the same position as women, and State legislation recognizing this difference is constitutional.

In the instant case, however, the court below carried *Michael M.* one step further: state recognition of the difference in male and female breasts, for the purpose of prohibiting their exposure as commercial free speech. The court said that this was nothing more than a permissible application of the *Michael M.* doctrine of treating different things differently, namely, male and female breasts.

Michael M. was a closely divided opinion decided over sixteen years ago. It is unreasonable to allow it the breadth of meaning given it below. The difference, if any, in male and female breasts is not sufficient to permit discriminatory regulation of commercial free speech in the form of topless dancing. See, *People of New York, supra*, 585 N.Y.S.2d, at 151 (finding upon the basis of expert testimony that male and female breasts are physiologically similar except for lactation capability).

IV. The Case Implicates The Continued Validity Of *Mississippi University For Women v. Hogan*.

The court below also relied upon this Court's decision in *Mississippi University For Women v. Hogan*, 458 U.S. 718 (1982). App. 34. However, under that decision, the subject regulation simply cannot stand for it does not possess a "direct, substantial relationship," id. at 725, to the legitimate state objective sought to be furthered by it.

Mississippi University For Women, as it seems most of this Honorable Court's decisions in this area are, was a five to four vote, rendered over fifteen years ago. Justice O'Connor, writing for the majority, expanded the Equal Protection Clause standard of review by requiring the State to show a "direct" and substantial relationship between gender-based discrimination and the legitimate state objective sought to be furthered by it. Id., at 725.

The legitimate state objectives put forth for the commercial free speech regulations in this case are the "negative secondary effects on the areas where [adult entertainment is] located. App. 5. (emphasis added). If the regulatory scheme as a whole regulates one activity (commercial free speech) to get at another (secondary effects on surrounding neighborhoods), then, *a fortiori*, it does not possess a direct relationship to those secondary effects. Rather, its

relationship is entirely indirect.

Only if the broadened standard of review announced in *Mississippi University For Women* is no longer good law may the regulation below stand under Equal Protection scrutiny.

V. The Question Is Of First Impression And Needs To Be Addressed By This Court.

To Petitioner's knowledge, the precise question raised here has never been squarely addressed by this Court. It is time that this Court clarify the constitutionality of gender-based discrimination in commercial free speech settings.

Conclusion

For these reasons, this Petition should be granted.

Respectfully submitted,

ORIGINAL SIGNED BY
ROBERT G. GILDER

ROBERT G. GILDER #4832
ATTORNEY FOR PETITIONER
P.O. BOX 193
SOUTHAVEN, MS 38671
(601) 342-1444

IN THE SUPREME COURT OF MISSISSIPPI

NO. 93-CA-00874-SCT

DECIDED DECEMBER 12, 1996

CITY OF JACKSON, MISSISSIPPI

v.

LAKELAND LOUNGE OF JACKSON, INC.

BEFORE SULLIVAN, P.J., SMITH AND MILLS, JJ.

SULLIVAN, PRESIDING JUSTICE, FOR THE COURT:

The city of Jackson (City) enacted amendments to their zoning ordinance. The amendments were enacted in an effort to regulate adult entertainment within the City. Lakeland Lounge, Inc. (Lakeland) incorporated for the purpose of opening a club offering adult entertainment in the form of topless dancing. Lakeland opened a club on Lakeland Drive called "Danny's" which offered topless dancing. Danny's location at 1925 Lakeland Drive, Jackson, MS, is zoned general commercial C-3. However, according to the City zoning ordinance, adult entertainment is allowed only in areas zoned light industrial, I-1.

This legal dispute originated in February of 1992. This case has been before the Federal District Court of the Southern District of Mississippi three times, and before the United States Fifth Circuit Court of Appeals once. The City brought suit in Hinds Chancery Court to enforce the Fifty Circuit's ruling that the zoning ordinance is constitutional. Chancellor Dillard ruled that the zoning ordinance is unconstitutional and now the case is before this Court.

I.

A.

In September 1991, "Tiffany's", a night club offering adult entertainment in the form of topless dancing, opened in Jackson, MS. Due to public uproar, the City tried to close down the club on a technical code violation but failed. A few weeks later a second club called the "Longhorn Gentleman's Club" opened providing the same form of adult entertainment. In September the mayor directed the zoning director to begin a process for adopting a public measure that would address the public concerns. ***Lakeland Lounge of Jackson, Inc. v. City of Jackson, Miss,*** 973 F.2d 1255, 1256-7 (5th Cir. 1992); ***City of Jackson, Miss v.***

Lakeland Lounge of Jackson, Inc., 800 F.Supp 455, 458 (S.D.Miss. 1992)

On January 28, 1992, the City amended its zoning ordinance to regulate and disperse adult entertainment establishments. The amended ordinance requires adult entertainment businesses to locate in I-1 light industrial zoning districts and may be permitted in the central business district with a use permit. Additionally, adult entertainment businesses may not locate within 250 feet of each other or more than 1,000 feet from a church or school, park, playground or residential area. Pre-existing adult businesses were given three years to comply. The amendments to the ordinance went into effect on February 27, 1992. *City of Jackson,* 973 F.2d at 1257; 800 F.Supp. at 459.

These regulations were prompted by the City Attorney's office and the City Planning Department. These City departments collected materials, studies and ordinances from other areas concerning adult entertainment. These studies and materials addressed the effects that adult entertainment has on local communities. The materials concluded that adult entertainment businesses had negative

secondary effects on the areas where they are located. *Id,* at 1257; 800 F.Supp. at 458.

In January, 1992, Lakeland was incorporated for the purpose of operating a restaurant/lounge with adult entertainment in the form of topless dancing. Lakeland received a beer license from the city and state and executed a lease for property in an area zoned as C-3 "general commercial" *Id,* at 1257. On February 12, 1992, Lakeland applied for a building permit to expand operational space. At the time of the application, Lakeland was not in operation nor was the amended ordinance in effect. When the City caught wind that Lakeland was going to offer adult entertainment, the City refused to issue a building permit for expansion. *City of Jackson,* 800 F.Supp. at 458.

On February 20, 1992, Lakeland filed suit in Hinds County Chancery Court seeking injunctive relief which would require the City to issue the building expansion permit. Lakeland's request was denied. Therefore, on February 27, 1992, Lakeland sued the City in United States District Court under cause number J92-0123(B). Lakeland sought to have the ordinance declared unconstitutional and

its enforcement enjoined. The district court denied Lakeland's motion for a temporary restraining order. On April 30, 1992, Judge Barbour declared the ordinance unconstitutional and permanently enjoined its enforcement. Judge Barbour found the City had nothing to support its assertion that adult entertainment establishments have negative or detrimental secondary effects on the surrounding community. The City appealed to the Fifth Circuit for a motion to stay Judge Barbour's opinion. ***Lakeland Lounge,*** 973 F.2d at 1257; 800 F.Supp. at 459.

Lakeland continued its efforts to obtain various building permits. Lakeland continually applied for an expansion permit. An additional controversy arose concerning another Building Code section mandating a certificate of occupancy. The City continually denied the applications and found various violations of the building code. On May 6, 1992, Lakeland opened for business. On May 8, 1992, Lakeland informed the City of its opening. Lakeland claimed that they were in compliance with all building code sections. On May 13, 1992, the City filed a complaint in Hinds County Chancery Court charging that Lakeland was operating in violation of the building code. Lakeland filed for removal to the federal court

based on a federal question. Upon removal to federal court, cause No. J92-0283(W), Lakeland filed a counterclaim and motion for injunctive relief to prohibit the City from continuing a pattern and course of conduct which interferes with the free exercise of a right protected by the First Amendment of the United States Constitution. Judge Wingate found that the City's refusals to issue permits violated protected speech. However, since the case was predicated upon the constitutionality of the zoning ordinance, and the constitutionality of the ordinance was pending in the Fifth Circuit from cause no. J92-0123(B), Judge Wingate determined to stay the instant holding in the case until the Fifth Circuit ruled on the City's motion to stay. ***City of Jackson,*** 800 F.Supp. at 459-60, 467-68.

On October 5, 1992, the United States Court of Appeals for the Fifth Circuit reversed Judge Barbour's ruling and found that the zoning amendment was constitutional. ***Lakeland Lounge v. City of Jackson, Miss.,*** 973 F.2d 1255 (5th Cir. 1992). In short, the Fifth Circuit concluded that "the Jackson City Council properly considered the secondary effects of adult business and provided sufficient alternative avenues of expression for them." ***Id,*** at 1260. On November 4, 1992,

the Fifth Circuit denied Lakeland's petition for rehearing. ***Lakeland Lounge v. City of Jackson, Miss.***, 979 F.2d 211 (5th Cir. 1992). On April 19, 1993, the United States Supreme Court denied *writ of certiorari*. ***Lakeland v. City of Jackson, Miss.***, 507 U.S. 1030, 113 S.Ct. 1845, 125 L.Ed.2d 649 (1993).

B.

On December 9, 1992, the City hand delivered a letter to Lakeland's counsel, the late Matthew Moore. The letter advised that Lakeland's adult entertainment activities conducted at the premises known as "Danny's" violate the Zoning Ordinance and demanded the cessation of such activity immediately. Lakeland continued to provide topless dancing entertainment.

On December 11, 1992, the City filed a complaint against Lakeland in Hinds Chancery Court cause no. 150,720. The complaint sought injunctive relief preventing Lakeland from doing business in the form of topless dancing which is in violation of the City's Zoning Ordinance. Chancellor Robinson granted an *ex parte* temporary restraining order restraining Lakeland from providing adult entertainment on December 11, 1992, at

2:50 p.m. Furthermore, Chancellor Robinson set a hearing for the preliminary injunction to be held on December 22, 1992. At 8:20 p.m. on December 11, 1992, Chancellor Robinson dissolved the temporary restraining order claiming that Lakeland did not have sufficient notice pursuant to MRCP 65.

On December 21, 1992, Lakeland filed for a removal of the action to the United States District Court for the Southern District of Mississippi under 28 U.S.C. § 144, alleging federal question jurisdiction pursuant to 28 U.S.C. § 1331. The city made a motion to remand to Hinds County Chancery Court. On March 8, 1993, United States Magistrate Nichols granted the City's motion for remand. The federal court clerk sent a certified copy of the order to the clerk of the state court. ***City of Jackson, Miss. v. Lakeland Lounge,*** 147 F.R.D. 122 (S.D.Miss. 1993).

On March 11, 1993, Hinds County Chancery Court filed a notice of hearing before Chancellor Dillard. The hearing pertained to the City's motion for a temporary restraining order. On March 22, 1993, Lakeland filed a motion for continuance. The motion stated that U.S. Magistrate Judge Nichols' March 8, 1993, order of remand was being appealed to

United States District Judge Barbour pursuant to the local rules of the Southern District of Mississippi, and the Federal Rules of Civil Procedure. Therefore, Lakeland's motion stated that any action by Hinds County Chancery Court would be premature.

On March 24, 1993, Chancellor Dillard heard Lakeland's motion for continuance on the City's motion for a temporary restraining order. At the hearing, Mr. Moore, counsel for Lakeland, stated that Judge Barbour would not grant a stay as to Judge Nicols' remand and an opinion and order would be issued on the ruling later. However, Lakeland still maintained that Hinds County Chancery Court's jurisdiction of the matter was premature since the federal court had not given a final ruling on the appeal of the magistrate's remand. After hearing matters from both sides, Chancellor Dillard denied Lakeland's motion for continuance. Dillard granted the City's motion for a temporary restraining order but stayed the order until Judge Barbour of the federal court made a ruling on the remand.

On March 29, 1993, Chancellor Dillard issued a temporary restraining order restraining Lakeland from providing topless dancing. On the same day, the

City Attorney's office hand delivered a letter to Lakeland's counsel, Mr. Moore, advising of the temporary restraining order. On March 31, 1993, the City filed in Hinds Chancery Court a motion for contempt and to extend the temporary restraining order. On April 7, 1993, Chancellor Dillard extended the temporary restraining order for another ten days.

On April 1, 1993, Judge Barbour determined that the federal court no longer had jurisdiction of the case *sub judice*. ***City of Jackson, Miss v. Lakeland Lounge,*** 147 F.R.D. 122 (S.D.Miss. 1993). Therefore, on April 16, 1993, a hearing was held before Chancellor Dillard on motions for a temporary restraining order, preliminary and permanent injunction, and a citation for contempt. The City argues that Lakeland violated the temporary restraining order which was first issued on March 29 and extended on April 7, 1993, and is therefore in contempt of court because Lakeland continues to perform female topless dancing. Lakeland contended that the ordinance was vague and ambiguous and therefore unconstitutional since it failed to give notice of the precluded behavior.

Chancellor Dillard dissolved the temporary restraining order and denied the motion to hold anyone in contempt. Dillard concluded that an essential part of the ordinance "Specified Anatomical Areas", could be interpreted in at least two different ways. Citing MRCP 65(d), Dillard concluded that the order had the problem of notice. Chancellor Dillard based his conclusion on the fact that only counsel for Lakeland, Mr. Moore, had been served the order, and that Lakeland had not been served.

In response to the City's motion for clarification of the judgement to determine the interpretation of Section 8, paragraph 202.80(a), Specified Anatomical Areas, on July 9, 1993 Chancellor Dillard issued an Opinion of the Court defining the ordinance section in question. Chancellor Dillard held that according to the Fourteenth Amendment to the United States Constitution requiring equal protection, "females have equal rights to expose their breast to the same extent as would a male." The trial court, citing *Reed v. Reed*, 404 U.S. 71, 92 S.Ct. 251, 30 L.Ed.2d 225 (1971), stated the ordinance is constitutional and enforceable only if the reference to gender is struck. The trial court also concluded that section 202.80(a) Specified

Anatomical Areas is "hopelessly and constitutionally ambiguous." The trial court, citing ***Zeigler v. Zeigler,*** 174 Miss. 302, 164 So. 768 (1935), stated that according to the law, a statute "must be construed to avoid unthought of and unjust results." However, the trial court found that the section was vague and ambiguous, and therefore unconstitutional. Furthermore, the trial court discounted arguments from both sides that the parties were barred by *res judicata* and collateral estoppel citing ***Dunaway v. W.H. Hopper and Associates, Inc.,*** 422 So.2d 749 (Miss. 1982) and ***Moore v. Molpus,*** 578 So.2d 624 (Miss. 1991). In conclusion, the court granted a permanent injunction with the exception to the exposure of the female breast.

The City filed a notice of appeal to this Court on July 28, 1993. The appeal concerns the Chancellor's denying of the permanent injunction with respect to the City's Adult Entertainment Ordinance regulating the exposure of the female breast.

Before addressing the City's contentions of error by the lower court, this Court notes that Lakeland, appellee, did not submit a brief. This Court in numerous cases has stated, "... that the

failure of the appellee to file a brief is tantamount to a confession error and will be accepted as such unless we can with confidence say, after considering the record and brief of appellant, that there was no error." ***Snow Lake Shores Property Owners v. Smith,*** 610 So.2d 357, 361 (Miss 1992) (*quoting* ***Burt v. Duckworth,*** 206 So.2d 850, 853 (Miss. 1968). the Chancellor found that the ordinance was unconstitutional since the ordinance is vague and ambiguous and violates the equal protection clause. The Chancellor also concluded that Lakeland was not barred under the doctrine of *res judicata*. This Court finds that the trial court erred and will address each error.

II.

WHETHER THE CHANCERY COURT ERRED IN FINDING THAT THE CITY OF JACKSON'S ADULT ENTERTAINMENT ORDINANCE IS VAGUE AND AMBIGUOUS AND THEREFORE UNCONSTITUTIONAL AND UNENFORCEABLE?

The section of the ordinance in dispute reads as follows:

> 202.80(a) Specified Anatomical Areas Less than completely and opaquely covered human genitals,

> pubic region, buttocks, anus or *less than 50% of the female breast below a point immediately above the top of the areolae;* or human genitals in a discernible turgid state even if completely opaquely covered. (Emphasis)

Lakeland argues that the ordinance is clear and straightforward. Lakeland contends that the ordinance is penal in nature and therefore should be construed strictly. Thus, Lakeland interprets the ordinance to specifically state that an establishment violates the ordinance if an establishment allows a female dancer to expose less than 50% of her breast from a point immediately above the areola.

The City holds that Lakeland's interpretation is ridiculous and ludicrous. The city also claims that the ordinance is clear and unambiguous. Female dancing with less than 50% of the breast covered constitutes a "specified anatomical area". Thus, the City claims that female topless dancing in general commercial C-3 zones violates the ordinance. However, the ordinance allows topless dancing in light industrial I-1 zones.

In the July 9, 1993 opinion, Chancellor Dillard found that the language of the ordinance is constitutionally vague and ambiguous due to conflicting interpretations of the ordinance. Dillard went on to illustrate various examples of what he felt the language could mean. First, Dillard reiterated Lakeland's position that female dancers must dance with their breasts more than 50% exposed in general commercial zones. Second, Dillard reiterated the City's position that female breasts must be at least 50% covered in general commercial zones. Dillard then questioned the City's position by asking as to what 50% of the breast must be covered. However the ordinance specifically states that the measurement of the area of the breast required covered begins "below a point immediately above the top of the areolae."

The ordinance reads in pertinent part: Adult entertainment establishments are defined as "behavior which is characterized by the exposure of less than 50% of the female breast below a point immediately above the top of the areola." However, when read with the entire "specified anatomical area" one grasps a better gist of what is prohibited, which reads: "Less than completely and opaquely covered human genitals,..., or less than

covered human genitals,..., or less than 50% of the female breast..." Even if the City did not word the ordinance as clearly as possible, obviously the sections prohibits topless dancing in an ordinance designed to regulate adult entertainment. A proper interpretation is that exposure of 50% of the female breast, determined 50% exposed if not covered from below the tope of the mid-point (the areola) of the breast, constitutes a specified anatomical area. In simple terms, if less than 50% of the breast is covered, then such action constitutes a specified anatomical area.

However, even if the ordinance is not absolutely entirely clear, case law demands a common sense interpretation and deference to the legislature. In *Ziegler*, 174 Miss. at 310, this court wrote:

> In construing statutes, the chief desire of the courts is to reach the real intention of the Legislature... Unthought of results must be avoided if possible, especially if injustice follows, and unwise purpose will not be imputed to the Legislature when a reasonable construction is possible." (Cites omitted.)

Certainly, requiring a woman to expose more than 50% of her breast is an unthought of result when the ordinance's specific purpose is to regulate topless dancing.

In ***Meeks v. Tallahatchie County***, 513 So.2d 563 (1987), this Court addressed the contours of the vagueness doctrine. ***Meeks*** recognized that languages are inherently ambiguous and what is important is whether the ordinary person of common intelligence understands what is allowed and not allowed. ***Meeks***, 513 So.2d at 567. ***Meeks*** relied on the United States Supreme Court.

> (A) statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process.

Meeks, at 566 (*citing* ***Connally v. General Construction Co.***, 269 U.S. 385, 46 S.Ct. 126, 70 L.Ed. 322 (1925).

A long line of cases reiterate the notion that the court take into account the legislative intent, as well as, not construe the wording so as to impute a

nonsensical or imputed meaning. In ***Quitman County v. Turner,*** 196 Miss. 746, 18 So.2d 122 (1944), this Court dealt with a dispute over the statutory interpretation of the Mississippi Code which involved the establishment of courts and judges' salaries. This Court wrote:

> Legislative intent as an aid to statutory construction, although often elusive to the unaided vision, remains nevertheless the pole star of guidance... We are not to construe clarity out of obscurity but intent out of inconsistency...
>
> ...It is our duty to support a construction which would purge the legislative purpose of any invalidity, absurdity or unjust inequality. ***Robertson v. Texas Oil Company,*** 141 Miss. 356, 362, 106 So. 449 (1925).

Quitman County, 196 at 759-60. *See also* ***Thornhill, et al. v. Ford,*** 213 Miss. 49, 56, So. 23 (1951) (stating that the Court construe statues consistent with the obvious intent unless repugnant to the context of the statute).

The general manager of Danny's, Jason Downing, testified on the interpretation of the ordinance. Downing's interpretation is important for two reasons. First, Downing tells the female dancers what they are allowed to do and not do. Secondly, and more importantly, Downing represents the imaginary average person, the person of common intelligence discussed in ***Meeks***. Downing stated that the ordinance meant that "a certain part of the breast has to be covered with latex, a colored latex, that's not see through." In other words, the breast must be at least 50% covered. The areola represents the 50% point. Any exposure below the top of the areola would constitute exposure of more than 50% of the breast and therefore constitute adult entertainment.

Lakeland's interpretation that females must expose at least 50% of their breasts in order to comply with the zoning ordinance is absurd. The policy behind the zoning ordinance was to regulate adult entertainment establishments in order to protect the community from the secondary effects of adult businesses. ***Lakeland Lounge***, 973 F.2d at 1260. Thus, Lakeland's interpretation imputes an unwise, unjust, unreasonable construction of the ordinance. The ordinance clearly

demands that establishments not located in an industrial I-1 zone keep female breasts at least 50% covered.

III.

WHETHER AN ORDINANCE HELD TO BE CONSTITUTIONAL BY THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT CAN BE CHALLENGED IN STATE COURT BY THE SAME PLAINTIFF ON DIFFERENT CONSTITUTIONAL GROUNDS AND FOUND CONSTITUTIONAL?

The City argues that Lakeland is precluded from raising the claim that the ordinance is unconstitutional based on the notion of vagueness and ambiguity. The City contends that when Lakeland challenged the constitutionality of the ordinance pertaining to the time, place, manner analysis in ***Lakeland Lounge***, *supra*, then Lakeland should have also raised any other constitutional issues as well. Furthermore, the City contends that since the federal court remanded this case in ***City of Jackson, Miss. v. Lakeland Lounge of Jackson, Inc.***, 147 F.R.D. 122, then the federal court ruled that there was no federal question and that the ordinance had been determined constitutional. Therefore, the City contends that Lakeland is precluded from challenging the

constitutionality of the ordinance based on the doctrine of *res judicata*.

The doctrine of *res judicata* requires the presence of four identities: (1) identity of the subject matter of the action; (2) identity of the cause of action; (3) identity of the parties to the cause of action; (4) identity of the quality or character of a person against whom the claim is made. ***Dunaway,*** 422 So.2d at 751; ***Mississippi Employment Security Commission v. Georgia Pacific Corp.,*** 394 So.2d 299 (Miss. 1981); ***Cowan v. Gulf City Fisheries, Inc.,*** 381 So. 2d 158 (Miss. 1980); ***Standard Oil Co. v. Howell,*** 360 So.2d 1200 (Miss. 1978). If all four identities are present, then the parties are precluded from relitigating any issues in a subsequent lawsuit if decided in a prior lawsuit.[1] ***Dunaway,*** at 751; ***Pray v. Hewitt,*** 254 Miss. 20, 179 So.2d 842 (1965); ***Golden v. Golden,*** 246 Miss. 562, 151 So. 2d 598 (1963). Furthermore, *res judicata* is conclusive not only of what was actually contested, but also all matters that might have been

---

[1]Collateral estoppel, on the other hand, precludes parties from relitigating the exact issue in a different and subsequent cause of action. *Dunaway*, at 751.

litigated and determined in that suit. ***Pray,*** 254 Miss. at 24. All claims which have been litigated in a prior suit, as well as all claims which should have been litigated in the prior suit, are barred from relitigation under the doctrine of *res judicata*. ***Johnson v. Howell,*** 592 So.2d 998, 1002 (Miss. 1991); ***Riley v. Moreland,*** 537 So.2d 1348, 1354 (Miss. 1989); ***Dunaway,*** at 751. "Where one has a choice of more than one theory of recovery for a given wrong, she may not assert them serially insuccessive actions but must advance all at once on pain of the bar of *res judicata*." ***Walton v. Bourgeois,*** 512 So.2d 698, 702 (Miss. 1987).

Factor 1, identity of the subject matter, is the zoning ordinance and its constitutionality. Factors 3 and 4, concerning the parties to the action, are the City and Lakeland. Thus, factors 1, 3, & 4 meet the identity requirement. The only real question is whether factor 2, the identity of the cause of action, is the same. Identity of the cause of action exists when there is a commonality in the "underlying facts and circumstances upon which a claim is asserted and relief sought from the two actions." ***Riley,*** 537 So.2d at 1354, citing ***Walton,*** 512 So.2d at 701. Lakeland initiated litigation seeking to have the ordinance declared

unconstitutional because the City was interfering with the free exercise of a right protected by the First Amendment to the United States Constitution. *City of Jackson,* 800 F.Supp. at 456. The Fifth Circuit ruled that the ordinance and the City's actions were constitutional. While the federal court cases determined the constitutionality of the City's public policy consideration involving the secondary effects of adult entertainment and the pending ordinance doctrine, the underlying issue was topless entertainment. Arguably Lakeland contested one aspect of the ordinance in the first line of cases and now raises a more specific challenge which the courts have not yet determined. However, in light of case law, Lakeland should have challenged the specific language of "specified anatomical areas" when it challenged the constitutionality of the City's conduct and intentions. Because a party may not relitigate and attempt to elude *res judicata* by raising a new legal theory, Judge Dillard was incorrect in not finding that Lakeland's challenge to the constitutionality of the ordinance was barred.

IV.

WHETHER THE CHANCERY COURT HAS AUTHORITY, *SUA SPONTE*, TO MAKE FINDINGS AND ENTER A JUDGEMENT ON ISSUES THAT WERE NOT RAISED OR PRESENTED BY EITHER PARTY TO THE LITIGATION?

The City sought a permanent injunction against Lakeland for its continued violation of Section 202.80(a) of the ordinance when Lakeland presented topless dancing at Danny's night club. Lakeland only contested the wording of the ordinance, section "specified anatomical areas", as to what part of a female's breast must be covered and/or exposed. Chancellor Dillard ruled on the constitutionality of the ordinance stating that it was vague and ambiguous. However, Chancellor Dillard also ruled on the constitutionality of the ordinance as it pertained to the Equal Protection Clause, a claim that neither party pled or brought up at trial. Namely, Dillard held that females have the same right as males in exposing their breast; and therefore, the reference to female must be stricken in order to uphold the constitution.

Chancellor Dillard's ruling counters court rules and procedures. "It is well-settled that the constitutionality of a statute will not be considered unless the point is specifically pleaded." ***State v. The Cabana Terrace, Inc.***, 247 Miss 26, 37, 153 So.2d 257 (1963) (Lee); ***Pacific States Box and Basket Company v. White***, 296 U.S. 176, 80 L.Ed. 138, 56 S.Ct. 159 (1935).

In ***Witt v. Mitchell***, 437 So.2d 63 (1983), this Court specifically addressed whether a Chancellor may decide a case based on a theory not in issue under the pleadings. In ***Witt***, the appellee Mark Mitchell sought one-half of Frances Mitchell Mayes' estate based on the allegement that his father was Mark L. Mitchell, brother of Mrs. Mayes. ***Witt***, 437 So.2d at 63. The Chancellor found that the appellee was the illegitimate son of Mark L. Mitchell. The Chancellor further held that Miss. Code Ann. § 91-1-15 (1972), which determined an illegitimate's inheritance from the father, was unconstitutional. ***Id.***, at 64. Nowhere did appellee allege he was the illegitimate son of Mark L. Mitchell or attack the constitutionality of § 91-1-15. On the contrary, appellee alleged and sought to prove that he was the legitimate son. ***Id.***, at 65. This Court concluded that the chancellor erred by deciding the

case upon an issue not in issue under the briefs. *Id.*, at 66. In determining the result, this Court relied on ***Lucas v. Lucas***, 415 So.2d 709, 712 (Miss. 1982); ***Seymore v. Greater Mississippi Life Insurance Co.***, 362 So.2d 611, 614-15 (Miss. 1978). This Court has quoted Griffith, *Mississippi Chancery Practice*, C.J.S. and Am.Jur.2d at length on this subject as follows:

The issues are framed, formed and bounded by the pleadings of the litigants.

The Court is limited to the issues raised in the pleadings and the proof contained in the record. Judge Griffith, in his monumental work on Mississippi Chancery Practice, gave these sound reasons why it must be so:

> "Courts do not instigate or initiate civil litigation. They act only when called on for aid and only in respect to that which is within the call. The potentiality of a court to consider and determine a given class of cases over which it has jurisdiction is made actual, in a particular case within that class, only when a party entitled to relief with respect thereto has applied to the court by his written pleading and

even then his written application must state the facts upon which it is based or else it will still be ineffectual to actuate the court to grant any grant. *The power of the court, then, will be exerted only upon and will not move beyond, the scope of the cause as presented by the pleadings, for the pleadings are the means that the law has provided by which the parties may state to the court what it is they ask of the court and the facts upon which they ask it;* and proof is received and is considered only as to those matters of fact that are put in issue by the pleadings, and never beyond or outside of them. If the rule were otherwise courts would become the originators instead of the litigators of litigious disputes, and parties would never know definitely what they will be required to meet or how to meet it." Griffith, *Mississippi Chancery Practice* (Second Edition 1950), § 564, pp. 586-87. (Emphasis added).

In 89 C.J.S. Trial, § 633 b, at page 464 (1955), we find this language:

"The findings when compared with the pleadings, and this is required whether or

not evidence is introduced on such issues. *It is improper to make findings outside the scope of the issues made by the pleadings; and where such findings are made, they are nugatory and cannot support conclusions of law or the judgment: they must be disregarded or treated as immaterial."*

76 Am.Jur.2d, Trial, § 1264, at page 215 (1975) says:

"The findings of fact made by the court should respond to and be within the issues, and a finding outside the issues cannot be considered in determining whether the judgment is supported by the findings." (emphasis ours). (362 So.2d at 614-615), (415 So.2d at 712).
437 So.2d at 65.

The only constitutional issue before Chancellor Dillard was whether specific wording in the ordinance was vague and ambiguous. The Equal Protection Clause issue was not before the court. Therefore, Judge Dillard's ruling that females have an equal right to expose their breasts as that of a male exceeded the powers of an officer of the court because the Equal Protection Clause argument was not in either parties' petitions, nor argued at trial.

V.

WHETHER THE CHANCERY COURT ERRED IN FINDING THAT THE CITY OF JACKSON'S ADULT ENTERTAINMENT ORDINANCE WAS UNCONSTITUTIONAL UNDER THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT TO THE U.S. CONSTITUTION BECAUSE FEMALES HAVE EQUAL RIGHTS TO EXPOSE THEIR BREASTS TO THE SAME EXTENT AS WOULD A MALE?

In the July 9, 1993 opinion, Chancellor Dillard held that under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, females have equal rights to expose their breasts to the same extent as would a male." Chancellor Dillard cited *Reed* v. *Reed*, 404 U.S. 71, 30 L.Ed.2d 225, 92 S.Ct. 251 (1971). Chancellor Dillard held that the ordinance was constitutional and enforceable only if the reference to gender was struck. However, regulating female topless dancers is essential in an adult entertainment ordinance. As analyzed previously, Chancellor Dillard went outside of the pleadings, lacked proper jurisdiction and was barred by the doctrine of *res judicata*. However, even if Chancellor Dillard did not lack jurisdiction, his conclusion that the

ordinance violates the Equal Protection Clause is incorrect.

In *Reed*, the United States Supreme Court stated that the Fourteenth Amendment does not deny the States the power to treat people of different classes in different ways. *Reed*, 404 U.S. at 75, 92 S.Ct. at 253, 30 L.Ed.2d at 229. However the Equal Protection Clause does deny States the power to legislate statutes which treat different classes differently when the criteria for different treatment and classes is wholly unrelated to the objective of the statute. *Id.*, at 75-76, 92 S.Ct. at 254, 30 L.Ed.2d at 229. "A classification 'must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.'" *Id.*, at 76, 92 S.Ct. at 254, 30 L.Ed.2d at 229; *Royster Guano Co. v. Virginia*, 253 U.S. 412, 415, 40 S.Ct. 560, 561, 64 l.Ed. 989 (1920). In order to withstand constitutional challenge, a gender classification "1) must serve important governmental objectives and 2) must be substantially related to achievement of those objectives." *Craig v. Boren*, 429 U.S. 190, 197, 97 S.Ct. 451, 457, 50 L.Ed.2d 397 (1976) (citations omitted).

In ***Michael M. v. Sonoma County Superior Court***, 450 U.S. 464, 101 S.Ct. 1200, 67 L.Ed.2d 437 (1981), the United States Supreme Court stated that the statutes treating males and females differently were not unconstitutional when reflecting the realistic differences between the sexes. The Equal Protection Clause does not "require 'things which are different in fact ... to be treated in law as though they were the same.'" ***Michael M.***, 450 U.S. at 469, 101 S.Ct. at 468, 67 L.Ed.2d at 442 (citations omitted). The Supreme Court "has consistently upheld statutes where gender classification is not invidious, but rather realistically reflects the fact that sexes are not similarly situated in certain circumstances." *Id.*, at 469, 101 S.Ct. at 468, 67 L.Ed.2d at 442. Courts must not disregard physiological differences in evaluating Equal Protection Clause issues. *Id.*, at 481, 101 S.Ct. at 1210-11, 67 L.Ed.2d at 450 (J. Stewart, *concurring*).

The federal courts on many occasions have held that denying females the right to expose their breasts, but not males, did not violate either the First Amendment or the Equal Protection Clause. In ***Craft v. Hodel***, 683 F.Supp. 289 (Mass. 1988), petitioners challenged a regulation banning nude bathing in Cape Cod National

Park. They alleged that the regulation violated the Fifth Amendment equal protection[2] component because males were permitted to walk and swim and play "shirt free" but females were not permitted to do so. *Craft*, 683 F.Supp. at 299. The *Craft* court stated that the distinction "simply recognizes a physical difference between the sexes which has implications for the moral and aesthetic sensitivities of a substantial majority of the country." *Id.*, at 300. *Craft* inevitably found that allowing males to expose their breasts, but not females, was substantially related to an important governmental objective. *Id.*, at 299-301. *But see People of New York v. David,* 585 N.Y.S.2d 149 (1991) (holding that local ordinance prohibiting females from exposing their breast on public beach violated the Equal Protection Clause by not serving a legitimate governmental interest better than a content neutral law because male and female breasts are physiologically similar except for lactation capability).

---

[2]The ordinance applied to a National Park, and therefore the 5th Amendment applied. The Fourteenth Amendment applies to state ordinances.

In *United States v. Biocic*, 928 F.2d 112 (4th Cir. 1991), the fourth circuit determined that a female's exposure of her breasts, but not male breasts, in a national park violated a federal regulation defining indecency. The regulation withstood various constitutional challenges. The fourth circuit determined that the distinction between exposure of male and female breasts was substantially related to an important governmental interest, and therefore did not violate the Equal Protection Clause. The court determined that:

> The important governmental interest is the widely recognized one of protecting the moral sensibilities of that segment of society that still does not want to be exposed willy-nilly to public displays of various portions of their fellow citizens' anatomies that traditionally in this society have been regarded as erogenous. These still include (whether justifiable or not in the eyes of all) the female, but not the male, breast.

Biocic, 928 F.2d at 115-16.

The United States Supreme Court has determined that regulation of nude and female topless dancing does not violate the United States Constitution. See ***Barnes v. Glen Theatre, Inc.***, 501 U.S. 560, 111 S.Ct. 2456, 115 L.Ed.2d 504 (1991). The federal courts have addressed the Equal Protection Clause issue in connection with state ordinances which regulate adult entertainment by restricting the exposure of females' breasts, but not males' breasts. ***Tolbert v. City of Memphis, Tenn.***, 568 F.Supp. 1285 (W.D. Tenn. 1983), held that restricting the exposure of female breasts did not violate the Equal Protection Clause. The court reasoned, "In our culture, for the purpose of this type of ordinance, female breasts are a justifiable basis for a gender-based classification." ***Tolbert***, 568 F.Supp. at 1290; *see generally* ***Mississippi University for Women***, 458 U.S. 718, 102 S.Ct. 3331, 73 L.Ed.2d 1090 (1982).

Finally, the Fifth Circuit, on at least two occasions, has upheld adult entertainment ordinances that regulate exposure of female breasts, but not male breasts, challenged under the Equal Protection Clause. ***SDJ, Inc. v. City of Houston***, 837 F2d 1268 (5th Cir. 1988); ***Hang On, Inc. v. City of Arlington***, 65

F.3d 1248 (5th Cir. 1995). In both cases, the Fifth Circuit held that regulation of female breasts, but not male breasts, was substantially related to the City's interest in regulation. Therefore, according to case law, the Chancellor erred in determining that the ordinance violated the Equal Protection Clause.

In conclusion, a common-sense reading and interpretation of the ordinance is not vague and ambiguous. The constitutional challenges to the city ordinance were precluded under the doctrine of *res judicata* because Lakeland had already had its day in court and failed to make said challenges. Since a trial judge may only rule on issues pleaded before the court, the Chancellor erred by going outside the scope of the pleadings by determining that females have the same rights as males in exposing breasts. Finally, the Chancellor erred in determining that the ordinance violated the Equal Protection Clause by prohibiting females from exposing their breasts, but not males.

REVERSED AND RENDERED.

LEE, C.J., PRATHER, P.J., PITTMAN, BANKS, McRAE, ROBERTS, SMITH AND MILLS, JJ., CONCUR.

IN THE CHANCERY COURT OF THE
FIRST JUDICIAL DISTRICT
OF HINDS COUNTY , MISSISSIPPI

CITY OF JACKSON

PLAINTIFF

VS. CAUSE NO. 150, 720 D/2

LAKELAND LOUNGE OF JACKSON, INC.

DEFENDANT

OPINION OF THE COURT

Unpublished Opinion
Filed July 9, 1993
Book 1063
Pages 304-309

The Plaintiff seeks permanent injunctive relief against the defendant enjoining the violation of Section 202.80(a) of its ordinance at Danny's nightclub located at 1925 Lakeland Drive, Jackson, Mississippi. The specific language sought to be enforced from the zoning ordinance is as follows:

> Specified Anatomical Areas Less than completely and opaquely covered human genitals, pubic region, buttocks, anus or *less than 50% of the female breast below a point immediately above the top of the areolae;* or human male genitals in a discernibly turgid state even if completely and opaquely covered. (Emphasis added).

For the reasons set forth herein, the Court holds that under the equal protection clause of the Fourteenth Amendment to the United States Constitution requiring equal protection, females have equal rights to expose their breast to the same extent as would a male. Therefore, the ordinance is constitutional and enforceable only by striking the reference to sex or gender according to the U.S. Supreme Court's opinion in Reed v. Reed, 404 U.S. 71, 30 L.Ed.2d 225, 92 S.Ct. 251, which holds that preference may not be given to a male over a female or vice versa under the aforesaid amendment. In other words, regardless of how or from what point the measurement is made, the female has an equal right to exhibit her breast as does her male counterpart.

We arrive at this conclusion based on the complaint filed December 11, 1992, by the City which set forth that the zoning ordinance was adopted on January 28, 1992, resulting in a decision by U.S. District Judge William H. Barbour, Jr., on April 30th declaring certain provisions unconstitutional. Judge Barbour's

decision was reversed on October the 5th by the United States Court of Appeals for the Fifth Circuit and rehearing was denied on November 4, 1992. The Court of Appeals denied a motion for a stay of the mandate to allow a writ of certiorari to the U.S. Supreme Court and then on December the 8th Judge Barbour dismissed Danny's claim for declaratory and injunctive relief, resulting in this suit being filed by the City against Danny's.

Danny's is a nightclub coming within the agreed classification of an adult entertainment establishment located in a C-3 commercial zoning district, and such activity is only allowed in a light industrial district classified as I-1, as is the Rocket Gentlemen's Club and the new establishment, Fantasies. The other adult entertainment establishment is Tiffany's, but it was given an exemption because it was operating at the time the ordinance was adopted. The City seeks a preliminary and permanent injunction prohibiting the defendant from doing business in the form of adult entertainment and/or topless dancing.

They filed a copy of the City's notice to the attorney for the defendant to cease and desist, along with an affidavit of Bill Hardin stating that the dancers were performing topless in violation of the City's ordinance. Chancellor Stuart Robinson granted the temporary restraining order of the 11th day of December, 1992, at 2:50 o'clock p.m. enjoining female topless dancing at the nightclub. At 8:20 p.m. on that same date, Chancellor Robinson dissolved the

temporary restraining order upon the cause being removed to federal court or because the federal court, at least, had not ruled on said removal.

On the 8th day of March, 1993, United States Magistrate Judge Alfred G. Nichols, Jr., remanded this cause to the Chancery Court of the First Judicial District of Hinds County, and this Court entered a temporary restraining order on the 29th day of March, 1993, at 2:45 p.m. On March 31 the City moved to cite the defendant for contempt for unlawful topless dancing as defined in the ordinance hereinabove set forth. At that hearing the Court refused to cite for contempt on the basis that the temporary restraining order was never required under Rule 65, Mississippi Rules of Civil Procedure.

The parties have now submitted the issue to the Court based on the evidence and stipulations heretofore made where the City seeks to permanently enjoin female topless dancing with "less than 50% of the female breast below a point immediately above the top of the areolae." The defendant says, We are dancing with more than 50 percent of the female breast exposed because the ordinance prevents us performing adult entertainment otherwise. Both parties, having submitted extensive briefs, stipulations, and arguments to the Court, have requested the Court to rule without further hearings or evidence.

Therefore, to bring this long, drawn out, sensitive issue to a close involving how much tissue can be exposed, the Court is compelled to find that the language in

question is hopelessly and constitutionally vague and ambiguous. For example, you can argue, as does the defendant, that you cannot dance with less than 50 percent of the female breast exposed or that would not be nightclub entertainment so that it does not mean, as argued by the City, that it has to be halfway covered. If, however, you say that it has to be at least halfway covered, what portion of the female breast may be uncovered? If you measure from the top of the areolae, does it mean 50 percent of the part below the areolae, which could mean only 10, 15, or 25 percent of the total female breast.

Another argument could follow that, since the language refers to the other regions being completely and opaquely covered, the female breast could be only 50 percent completely and opaquely covered or veiled so that one could view the entire breast but only less than 50 percent unobstructed or clear view, which would not be unreasonable in cabaret dancing.

Our law requires, however, that "[t]he statute must be construed to avoid unthought of and unjust results." Zigler v. Zigler, 174 Miss. 302, 164 So. 768. There are countless other arguments, but the issue is not one of *res judicata* or collateral estoppel as argued by counsel for both parties under Dunaway v. W.H. Hopper and Associates, Inc., 422 So.2d 749 (Miss. 1982), and Moore v. Molpus, 578 So.2d 624 (Miss. 1991). Counsel for both sides cite numerous other authorities; however, this Court holds that neither

doctrine applies in this case because the issue here has not been raised and is not before the Court until this judgment becomes final.

The City concedes that the language is ambiguous by suggesting that the words "completely and opaquely covering" be inserted between the words "then" and the number "50%." This the Court cannot do, and neither can the Court rewrite the ordinance. The Court may, however, enforce the provisions of the ordinance that are valid and enforceable because one defect does not require the complete abolishment of the entire ordinance.

Therefore, this Court grants the permanent injunction with the exception of the provision as to the female breast. The issue, therefore, as to how much or in what manner the defendants allow females to expose their breasts is not before the Court at this time. The long and short of it, regardless of how it is measured, females have the equal right to expose their breasts as do males or even those somewhere in between. The rights are guaranteed by the Fourteenth Amendment and the U.S. Supreme Court in Reed, *supra*.

The City may prepare a judgment consistent with the above opinion and submit the same to counsel for Danny's to be entered not more than ten days from the date hereof.

This, the 9th day of July, 1993.

/s/W.O. DILLARD
CHANCELLOR

Supreme Court of Mississippi
Linda Stone, Clerk
Third Floor Garton Building
450 High Street
P.O. Box 249
Jackson, Mississippi 38205-0249

DEPUTY CLERKS
KATHY GILLIS
BETTY MALANCHAK

TELEPHONE:
601/359-3694
FAX:
601/359-2407

February 13,1997

Sarah Alicia O'Reilly-Evans
City Attorney's Office
P.O. Box 17
Jackson, MS 392050017

Terry Wallace
District Attorney
P.O. Box 22747
Jackson, MS 38205

This is to advise you that the Mississippi Supreme Court rendered the following decision on the 13th Day of February, 1997.

Supreme Court Case #93-CA-0874
Trial Court Case #15720D2

City of Jackson, Mississippi
vs.
Lakeland Lounge of Jackson, Inc.

Motion for Rehearing denied.

Supreme Court Clerk
lwp

ccs: Chris N.K. Ganner
John R. Countiss, III
Lakeland Lounge of Jackson
Hinds County Chancery Clerk

* NOTICE TO CHANCERY/CIRCUIT/COUNTY COURT CLERKS *

If any original of any exhibit other than photos was sent to the Supreme Court Clerk and should now be returned to you, please advise this office in writing immediately.

(2)

Supreme Court, U.S.
FILED
NOV 10 1997
CLERK

No. 97-458

In The

Supreme Court of the United States

October Term, 1997

Lakeland Lounge of Jackson, Inc.,

Petitioner,

v.

City of Jackson, Mississippi,

Respondent,

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

SARAH A. O'REILLY-EVANS #6548
OFFICE OF CITY ATTORNEY
CITY OF JACKSON, MISSISSIPPI
POST OFFICE BOX 17
JACKSON, MISSISSIPPI 39205
(601) 960-1799
Attorney for Respondent

15pp

QUESTIONS PRESENTED

1. Whether a municipalities' adult entertainment ordinance that regulates the exposure of female breasts, but not male breasts, violates the Equal Protection Clause.

2. Whether this court will grant certiorari to review the judgment of a state Supreme Court on a constitutional issue not previously raised by petitioner, and not dispositive of the case.

PARTIES TO THE PROCEEDINGS

The caption of the case contains the names of all the parties to the proceedings. There is no parent or subsidiary company to be listed pursuant to S. Ct. R. 29.6; however, Lakeland Lounge is d/b/a Danny's at 1925 Lakeland Drive, Jackson, MS, which is the subject of this litigation.

TABLE OF CONTENTS

Questions Presented i

Parties to the Proceedings ii

Table of Contents iii

Table of Authorities iv

Opinions Below 1

Statement of the Case 2

Reasons for Denying the Petition 5

I. The Mississippi Supreme Court's ruling is consistent with case law established by the U.S. Supreme Court and Federal Courts 6

II. Petitioner has failed to previously raise this constitutional issue 8

III. The equal protection issue was not dispositive of this cause 9

Conclusion 9

TABLE OF AUTHORITIES

Barnes v. Glen Theatre, Inc., 501 U.S. 560, 111 S. Ct. 2456, 115 L.Ed. 2d 504 (1991) 6

City of Jackson, Miss. v. Lakeland Lounge, 147 F.R.D. 122 (S.D. Miss. 1993) 1,4

City of Jackson, Miss. v. Lakeland Lounge of Jackson, Inc., 800 F. Supp. 455, 458 (S.D. Miss. 1992) 3

City of Jackson, Miss. v. Lakeland Lounge, 800 F.Supp. 459-60, 467-68 (S.D. Miss. 1992) 1,3

City of Jackson, Mississippi v. Lakeland Lounge of Jackson, Inc., 688 So.2d 742, (Miss. 1996) 5

Hang On, Inc. V. City of Arlington, 65 F.3d 1248 (5th Cir. 1995) 7

Lakeland Lounge of Jackson, Inc. v. City of Jackson, Miss., 507 U.S. 1030, 113 S. Ct. 1845, 123 L.Ed. 2d 469 (1993) 1,4

Lakeland Lounge of Jackson, Inc. v. City of Jackson, Miss., 800 F.Supp. 455 (S.D. Miss 1992) 1

Lakeland Lounge of Jackson, Inc. v. City of Jackson, Miss., 973 F.2d 1255 (5th Cir. 1992) 8

Lakeland Lounge of Jackson, Inc. v. City of Jackson, Miss., 973 F.2d 1257; 800 F.Supp. 459 (5th Cir. 1992). 1,3

Lakeland Lounge of Jackson, Inc. v. City of Jackson, Miss., 979 F.2d 211 (5th Cir. 1992) 1,4

Mississippi University for Women v. Hogan, 458 U.S. 718, 102 S.Ct. 3331, 73 L.Ed 2d 1090 (1982) 7,8

SDJ, Inc. vs. City of Houston, 837 F.2d 1268 (5th Cir1988). 7

The People of the State of New York v. David, 152 Misc. 2d 66, 585 N.Y.S. 2d (1991)..... 7

Tolbert v. City of Memphis, Tenn., 568 F.Supp.1285 (W.D.Tenn. 1983) 6,7

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

The City of Jackson, Mississippi, respectfully files this its brief in opposition to Lakeland Lounge, Inc.'s petition for a writ of certiorari to review the judgment of the Supreme Court of Mississippi in this case.

OPINIONS BELOW

The opinion of the Supreme Court of Mississippi is reported at 688 So.2d 742. The opinion of the Hinds County Chancery Court was rendered on July 9, 1993, and is unreported; however, it is contained in the appendix of petitioner's petition at App. 36.

This case also has been before the federal courts. See: ***Lakeland Lounge of Jackson, Inc. v City of Jackson, Miss.***, 800 F. Supp. 455 (S.D. Miss. 1992); ***City of Jackson, Miss. v. Lakeland Lounge of Jackson, Inc.***, 800 F. Supp. 459-60, 467-68; ***Lakeland Lounge v. City of Jackson, Miss.***, 973 F.2d 1255 (5th Cir. 1992); ***Lakeland Lounge of Jackson, Inc. v. City of Jackson, Miss.***, 979 F.2d 211 (5th Cir. 1992); the United States Supreme Court denied writ of certiorari in ***Lakeland Lounge of Jackson, Inc. v. City of Jackson, Miss.***, 507 U.S. 1030, 113 S. Ct. 1845, 123 L.Ed. 2d 469 (1993); and ***City of Jackson, Miss. v. Lakeland Lounge of Jackson, Inc.***, 147 F.R.D. 122 (S.D. Miss. 1993).

STATEMENT OF THE CASE

On January 28, 1992, the City of Jackson, Mississippi (the "City"), amended its existing Zoning Ordinance (R.Exhibit 1) to regulate and disperse adult entertainment businesses in the City, by requiring that these businesses locate in I-1 Light Industrial Zoning Districts and some areas of the Central Business District, with a use permit. Existing businesses were given three (3) years to comply. This amendment, the "adult entertainment ordinance," also regulated and defined the type of adult entertainment that may be conducted in these districts.

The Petitioner, Lakeland Lounge of Jackson, Inc. ("Lakeland") was incorporated in January, 1992 for the purpose of operating a restaurant/lounge with adult entertainment in the form of topless dancing in an area not zoned properly under the new ordinance. Lakeland sought various license/permits which were denied by the City, therefore, on February 20, 1992, Lakeland began litigation against the City. This case has been before the Federal District Court of the Southern District of Mississippi on three occasions and before the Fifth Circuit Court of Appeals.

The Mississippi Supreme Court provided the following facts in tracing the history of this cause:

On February 27, 1992, Lakeland sued the City in United States District Court under cause number J92-0123(B). Lakeland sought to have the ordinance declared unconstitutional and its enforcement enjoined. The district court denied Lakeland's motion for temporary restraining order; however, on April 30, 1992, Judge Barbour declared the ordinance unconstitutional and permanently enjoined its enforcement.

Judge Barbour found the City had nothing to support its assertion that adult entertainment establishments have negative or detrimental secondary effects on the surrounding community. The City appealed to the Fifth Circuit for a motion to stay Judge Barbour's opinion. ***Lakeland Lounge***, 973 F.2d at 1257; 800 F.Supp. at 459.

On May 6, 1992, Lakeland opened for business. On May 13, 1992, the City filed a complaint in Hinds County Chancery Court charging that Lakeland was operating in violation of the building code. Lakeland filed for removal to the federal court based on a federal question. Upon removal to federal court, cause no. J92-0283(W), Lakeland filed a counterclaim and motion for injunctive relief to prohibit the City from continuing a pattern and course of conduct which interferes with the free exercise of a right protected by the First Amendment of the United States Constitution. Judge Wingate found that the City's refusal to issue permits violated protected speech. However, since the case was predicated upon the constitutionality of the zoning ordinance, and the constitutionality of the ordinance was pending in the Fifth Circuit from cause no. J92-0123(B), Judge Wingate determined to stay the instant holding in the case until the Fifth Circuit ruled on the City's motion to stay. ***City of Jackson,*** 800 F.Supp. at 459-60, 467-68.

On October 5, 1992, the United States Court of Appeals for the Fifth Circuit reversed Judge Barbour's ruling and found that the zoning amendment was constitutional. ***Lakeland Lounge v. City of Jackson, Miss.,*** 973 F.2d 1255 (5th Cir. 1992). In short, the Fifth Circuit concluded that "the Jackson City Council properly considered the secondary effects of adult business and provided sufficient alternative avenues of expression for them." ***Id.,*** at 1260. On November 4, 1992, the

Fifth Circuit denied Lakeland's petition for rehearing. ***Lakeland Lounge v. City of Jackson, Miss.,*** 979 F.2d 211 (5th Cir. 1992). On April 19, 1993, the United States Supreme Court denied *writ of certiorari*. ***Lakeland Lounge v. City of Jackson, Miss.,*** 507 U.S. 1030, 113 S.Ct. 1845, 123 L.Ed.2d 469 (1993).

As a result of the Fifth Circuit's ruling that the City's Ordinance was constitutional, the City filed a complaint against Lakeland in Hinds Chancery Court cause no. 150,720 seeking injunctive relief preventing Lakeland from doing business in the form of topless dancing at that location, which is in violation of the City's Zoning Ordinance.

On December 21, 1992, Lakeland filed for a removal of the action to the United States District Court for the Southern District of Mississippi, alleging federal question jurisdiction. The City made a motion to remand to Hinds County Chancery Court. On March 8, 1993, United States Magistrate Nicols granted the City's motion for remand. The federal court clerk sent a certified copy of the order to the clerk of the state court. ***City of Jackson, Miss. v. Lakeland Lounge,*** 147 F.R.D. 122 (S.D. Miss. 1993).

On April 1, 1993, Judge Barbour determined that the federal court no longer had jurisdiction of the case *sub judice*. ***City of Jackson, Miss. v. Lakeland Lounge,*** 147 F.R.D. 122, (S.D. Miss. 1993). Therefore, on April 16, 1993, a hearing was held before Chancellor Dillard on motions for a temporary restraining order, preliminary and permanent injunction, and a citation for contempt. Lakeland contended that the ordinance was vague and ambiguous and therefore unconstitutional since it failed to give notice of the precluded behavior.

Chancellor Dillard held that according to the Fourteenth Amendment to the United States Constitution requiring equal protection, "females have equal rights to expose their breasts to the same extent as would a male." The trial court also concluded that section 202.80(a) Specified Anatomical Areas is "hopelessly and constitutionally ambiguous." (***City of Jackson v. Lakeland Lounge***, 688 So. 2d 742 Miss. 1996).

The City filed a notice of appeal to the Mississippi Supreme Court as a result of the Chancellor's denying the permanent injunction with respect to the City's Adult Entertainment Ordinance. Lakeland failed to file a brief with the Mississippi Supreme Court.

On December 12, 1996, the Supreme Court of Mississippi in the ***City of Jackson, Mississippi v. Lakeland Lounge of Jackson, Inc.***, 688 So.2d 742, (Miss. 1996) reversed and rendered finding that (1) the ordinance defining "specified anatomical areas" was not unconstitutionally vague; (2) the club's challenge to the constitutionality of the ordinance was barred under the doctrine of res judicata; (3) the trial court lacked authority to determine whether the ordinance violated the equal protection clause; and (4) the ordinance did not violate the equal protection clause by regulating exposure of female breasts but not male breasts.

Lakeland now requests this court to grant a writ of certiorari as to the equal protection question.

REASONS FOR DENYING THIS PETITION

The decision of the Mississippi Supreme Court is appropriate and consistent with the numerous rulings of this

court and the federal courts. Secondly, petitioner should be prohibited from raising this issue the first time by petition for writ of certiorari. Further, the constitutional issue petitioner is requesting that this court review was not dispositive of this case and will not affect the outcome.

I. THE MISSISSIPPI SUPREME COURT'S RULING IS CONSISTENT WITH CASE LAW ESTABLISHED BY THE U.S. SUPREME COURT AND FEDERAL COURTS.

The Mississippi Supreme Court properly found that the City of Jackson's Adult Entertainment Ordinance did not violate the Equal Protection Clause by prohibiting females from exposing their breasts, but not males in certain districts.

The Court stated in part as follows:

> "The United States Supreme Court has determined that regulation of nude and female topless dancing does not violate the United States Constitution. See ***Barnes v. Glen Theatre, Inc.***, 501 U.S. 560, 111 S. Ct. 2456, 115 L. Ed. 2d 504(1991). The federal courts have addressed the Equal Protection Clause issue in connection with state ordinances which regulate adult entertainment by restricting the exposure of females' breasts, but not males' breasts. ***Tolbert v. City of Memphis, Tenn.***, 568 F. Supp. 1285 (W.D. Tenn. 1983), held that restricting the exposure of female breasts did not violate the Equal Protection Clause.

> The court reasoned, "In our culture, for the purpose of this type of ordinance, female breasts are a justifiable basis for a gender-based classification." ***Tolbert***, 568 F. Supp. At 1290; *see generally* ***Mississippi University for Women***, 458 U.S. 718, 102 S.Ct. 3331, 73 L.Ed. 2d 1090 (1982).
>
> Finally, the Fifth Circuit, on at least two occasions, has upheld adult entertainment ordinances that regulate exposure of female breasts, but not male breasts, challenged under the Equal Protection Clause. ***SDJ, Inc. v. City of Houston***, 837 F.2d 1268 (5th Cir. 1988); ***Hang On, Inc. v City of Arlington***, 65 F.3d 1248 (5th Cir. 1995). In both cases, the Fifth Circuit held that regulation of female breasts, but not male breasts, was substantially related to the City's interest in regulation."

Clearly, based on the above case law, properly cited by the Mississippi Supreme Court, as well as widespread adult entertainment and nudity ordinances which have been upheld with similar language, the City's ordinance is not violating the Constitution. This is not a novel question of first impression by this court as urged by petitioner. This court spoke directly on the issue in ***Barnes v. Glen Theatre***, supra. Further, the fact that petitioner found one State Supreme Court in ***The People of the State of New York v. David***, 152 Misc. 2d 66, 585 N.Y.S. 2d (1991) that found differently based on different facts, is of no consequence.

Petitioner also argues that the Miss. Supreme Court did not properly apply this court's ruling in ***Mississippi University for Women v. Hogan***, supra. Yet, the court only said "see generally". And indeed the outcome was based on sound reasoning and case law consistently established by this court.

II. PETITIONER HAS FAILED TO PREVIOUSLY RAISE THIS CONSTITUTIONAL ISSUE.

Lakeland originally chose its own forum and challenged the City's ordinance in the U.S. District Court for the Southern District of Mississippi, wherein the defendant attacked the constitutionality of the ordinance. The United States Court of Appeals for the Fifth Circuit in its decision, ***Lakeland, Inc. v. City of Jackson, Mississippi***, supra, upheld the constitutionality of the ordinance, and properly refused to grant Lakeland an injunction to prohibit the enforcement of the Ordinance. The District Court remanded the cause to Chancery Court where the City was attempting enforcement of the Ordinance. Upon remand, the federal court stated that it had already determined the ordinance to be constitutional, and the state courts should enforce its provisions. However, upon the City's attempt to enforce the ordinance by obtaining a permanent injunction in Chancery Court, Lakeland raised a new challenge on the grounds that the ordinance was void for vagueness. In its opinion and judgment denying the City a permanent injunction to enforce the ordinance, the Chancery Court found a separate constitutional issue, which had not been plead or argued by either party to this action, and determined that the ordinance violated the Fourteenth Amendment to the U.S. Constitution requiring equal protection, because females have an equal right to expose their breasts. (App. 24) Upon appeal to the Miss. Supreme Court Lakeland did not even file a brief. (App.12)

Therefore, this court should not allow or hear this argument raised by Lakeland the first time by writ of certiorari.

III. THE EQUAL PROTECTION ISSUE WAS NOT DISPOSITIVE OF THIS CAUSE.

The Mississippi Supreme Court reversed the Chancellor's decision in this cause refusing to grant an injunction to enforce the City's Ordinance holding the constitutional challenges to the ordinance were precluded under the doctrine of *res judicata* because Lakeland had already had its day in court and failed to make said challenges; and because a trial judge may only rule on issues pleaded before the court; therefore, the chancellor erred by going outside the scope of pleadings by determining that females have the same right as males in exposing breasts. (App. 28)

Clearly, the Court's ruling on the equal protection issue raised by the Chancellor, sua sponte, was dictum, and a reversal by this court on that issue as now urged by petitioner would not effect the outcome of the Court's ruling.

CONCLUSION

For these reasons, the Respondent requests that this Petition be denied.

Respectfully submitted,

CITY OF JACKSON, MISSISSIPPI

BY: Sarah A. O'Reilly-Evans

Sarah A. O'Reilly-Evans
Deputy City Attorney
Attorney for Respondent
Post Office Box 17
Jackson, MS 39205
(601) 960-1799